

Zoning for the Regional Welfare

Municipal zoning has been justified in economic terms as a tool with which municipalities can correct for failures in the housing and public service markets.¹ The economic assumptions that underlie zoning deviate significantly from the real world situation, however, and municipalities often use their zoning power to regulate the allocation of developable resources in pursuit of other, parochial goals. Furthermore, because of the narrow scope of state enabling legislation² and because of restrictive judicial interpretations of the legislation,³ municipalities are permitted to ignore the impact of their zoning activities upon the greater region of which they are a part.⁴ Such zoning leads to the inefficient use of resources in the production of housing.

This Note argues that to ensure economic efficiency in housing development, legislative intervention is required that would define

1. See, e.g., Davis, *Economic Elements in Municipal Zoning Decisions*, 39 LAND ECON. 375, 375-76 (1963) (zoning regulations necessary to eliminate external diseconomies that result from unconstrained juxtaposition of land uses); Hamilton, *Property Taxes and the Tiebout Hypothesis: Some Empirical Evidence*, in FISCAL ZONING AND LAND USE CONTROLS 13, 14-15 (E. Mills & W. Oates, eds. 1975) (zoning necessary to eliminate free riders from consumption of public services financed through local property taxes).

2. The model law upon which most state enabling legislation has been based, see U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT § 1 (rev. ed. 1926), reprinted in C. RATHKOPF, THE LAW OF ZONING AND PLANNING 547 (2d ed. 1949) [hereinafter cited as STANDARD ENABLING ACT], specifically restricts the scope of the general welfare to that "of the [zoning] community." See, e.g., IOWA CODE ANN. § 414.1 (West 1976); N.C. GEN. STAT. § 160A-381 (1976).

3. See note 47 *infra* (federal courts); p. 760 *infra* (state courts).

4. The definition of a specific region and the delineation of its boundaries are not easy tasks, for spillover effects upon further geographic areas are inevitable. The New Jersey Supreme Court, for example, in *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713, *appeal dismissed*, 423 U.S. 808 (1975), noted that no rule could be established for the definition of a region, the composition of which would vary from one situation to another. 67 N.J. at 189, 336 A.2d at 733. The New Jersey Supreme Court has presented a detailed discussion of the empirical problem of defining such a region. See *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 536-41, 371 A.2d 1192, 1219-22 (1977).

Nonetheless, some restrictive concept is necessary, and since at some point the zoning effects of a single municipality become de minimis, an acceptable definition of a region may be made. Generally the regions of concern in zoning cases are metropolitan areas surrounding a central city, especially including the suburbs that face rapid development and population growth. Some discussions have utilized the concept of the Standard Metropolitan Statistical Area (SMSA) developed by the Office of Management and Budget as the region relevant to housing development and zoning concerns. See, e.g., *Urban League of Greater New Brunswick v. Mayor of Carteret*, 142 N.J. Super. 11, 21, 359 A.2d 526, 532 (Super. Ct. Ch. Div. 1976), *pet. for certification denied*, 74 N.J. 262 (1977); *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1644-46 (1978) [hereinafter cited as *Developments—Zoning*]. This definition of a region will underlie the discussion in this Note.

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the applicable general welfare as that of the whole region that shares population growth and developmental concerns with a given zoning municipality. The Note proposes a means of zoning regulation based upon the concept of "fair share" allocation of land uses among the municipalities of a region⁵ in order to guarantee that sufficient land is made available for all uses and that distributive social goals are furthered. The proposal allows for modification of the strict redistributive effects of the "fair share" allocation, however, by permitting municipalities to purchase or trade among themselves the right to develop the various uses. In this manner, the distributive goals can be modified to include other efficiency considerations without allowing municipalities to decrease the total amount of land that is supplied for each use in the region.

I. Economic Aspects of Zoning

From its inception, zoning has been used as a method for dealing with the problems of land use faced by a rapidly urbanizing society.⁶ Underlying the legitimation of the zoning power is a theory of market failure in the housing and public services markets absent municipal zoning. This theory, however, is based upon several premises that are themselves open to question.

A. *The Economic Theory of Zoning*

Given several assumptions concerning the behavior of consumers, producers, and markets,⁷ a competitive market at equilibrium will attain a Pareto optimal allocation of resources and goods.⁸ Without

5. The concept of "fair share" allocation of uses among municipalities in a given region was developed by the New Jersey Supreme Court in *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 174, 336 A.2d 713, 724, *appeal dismissed*, 423 U.S. 808 (1975). In that case, as in most challenges to municipal zoning activities, the restricted use was low-income housing. This Note will focus upon low-income housing as the most significant "undesirable" use, because its development is the most controversial and crucial in the long-term planning for urban regions.

6. R. ANDERSON, *AMERICAN LAW OF ZONING* § 1.13 (1968).

7. The assumptions are that consumers seek to maximize utility and producers to maximize profits, that production and utility functions are convex, that inputs and outputs are homogeneous and divisible, that conditions of universality of markets and exact knowledge obtain, and that there are no transaction costs. W. NICHOLSON, *MICROECONOMIC THEORY* 557 (2d ed. 1978); Bator, *The Anatomy of Market Failure*, 72 Q.J. ECON. 351, 353-56 (1958).

8. A Pareto optimal allocation is one at which no reallocation of goods among consumers could enhance the welfare of one consumer without making another worse off. W. NICHOLSON, *supra* note 7, at 518. For a discussion of the relationship between Pareto optimality and competitive equilibrium, see *id.* at 555-64; Scherer, *General Equilibrium and Economic Efficiency*, 10 AM. ECONOMIST 1, 14-16 (1966).

interference, a competitive market causes producers to use the available resources to produce the greatest possible amount of goods desired by consumers, and those goods are divided among consumers such that no consumer's utility may be increased without decreasing that of another.⁹ A necessary aspect of the competitive market is its pricing mechanism, which provides the information and incentives necessary to ensure that the economic actors produce and consume the proper amount of goods.¹⁰ In the housing and public service markets, however, several of the assumptions necessary for the proper functioning of a competitive pricing mechanism are violated, so that individuals fail to act in a manner necessary to bring about a Pareto optimal use of resources.¹¹

1. *The Problem of Externalities*

Early land use law recognized that some property uses impose costs upon neighboring property owners.¹² These added neighborhood costs are not considered by the offending use, so that its production costs are less than the actual social cost resulting from the activity.¹³ In this way the pricing mechanism, which forces the producer to recover only those costs that have been internalized, encourages over-production of the offending use and forces neighboring property owners to bear its uncaptured external costs.

The common law dealt with this problem in an ad hoc fashion, determining in each case whether to enjoin a challenged use because it constituted a "nuisance" to its neighbors.¹⁴ Early in the twentieth century, however, rapid urbanization juxtaposed myriad property uses, many of which imposed costs on others in surrounding areas. Determining the costs imposed and borne in each case would be impossible. Thus emerged the concept of comprehensive zoning, defined

9. Bator, *The Simple Analytics of Welfare Maximization*, 47 AM. ECON. REV. 22, 31-34 (1957); Scherer, *supra* note 8, at 4, 7.

10. For a general discussion of how the price mechanism operates and its significance, see R. DORFMAN, *PRICES AND MARKETS* 196-226 (3d ed. 1978); W. NICHOLSON, *supra* note 7, at 555-64.

11. The manner in which failures of the pricing mechanism result in the failure of an economy to attain a Pareto optimum is discussed in W. NICHOLSON, *supra* note 7, at 566-71.

12. See R. ANDERSON, *supra* note 6, at § 2.03.

13. W. NICHOLSON, *supra* note 7, at 568-71 ("The price system can also fail to allocate resources efficiently when there are interactions among firms and individuals that are not adequately reflected in market prices.")

14. R. ANDERSON, *supra* note 6, at § 2.03; Mills, *Economic Analysis of Urban Land-Use Controls*, in *CURRENT ISSUES IN URBAN ECONOMICS* 511, 514-15 (P. Mieszkowski & M. Straszheim, eds. 1979).

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as the division of a municipality into districts, each specified for development of only certain uses.¹⁵ Municipal governments hoped that the segregation of uses would alleviate the externalities; it was assumed that each use imposed no costs upon the same or similar uses and that external effects declined with increasing distance from an offending use.¹⁶

2. *The Elimination of Free Riders*

Another justification for zoning derives from the fact that many municipal services are financed through property taxes.¹⁷ With no con-

15. R. ANDERSON, *supra* note 6, at §§ 1.12-13; *Developments—Zoning*, *supra* note 4, at 1429. Zoning developed initially from some of the concepts of the common law of nuisance, and from the recognition that the problem of externalities was the crucial factor in the definition of nuisances. R. ANDERSON, *supra* note 6, at § 2.03; Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119, 1122-23 (1964). Rather than ban offending uses, many of which are integral to the expanding industrial society, zoning regulations restrict the areas available for their use, limiting their inimical effects upon neighbors.

The most common justification for zoning is that it “prevent[s] offensive uses of land that impose external costs on neighbors.” Maser, Riker, & Rosett, *The Effects of Zoning and Externalities on the Price of Land: An Empirical Analysis of Monroe County, New York*, 20 J. LAW & ECON. 111, 112 (1977). Zoning was meant to encourage the market tendency toward specialization of land use and the positive externalities that develop from that trend. *Id.*

From its inception, however, zoning also has been used for motives other than those of organizing urbanization and controlling externalities. For example, one of the earliest municipal restrictions on property use occurred in the 1880s, when the government of San Francisco limited the areas in which laundries could be built. This act was seen as an attempt to confine Chinese inhabitants to small areas of the city. Mills, *supra* note 14, at 515.

16. Because of these assumptions, zoning, when first established and to a great extent today, was “cumulative” or “hierarchical”; that is, in districts zoned for the least intensive use (large-lot single family homes) no other uses could be developed, but in each district at a lower step in the hierarchy both the use for which it was zoned plus all less intensive uses were permitted. At the lowest step in the hierarchy (usually heavy industry) any use was allowed. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 381 (1926); *Developments—Zoning*, *supra* note 4, at 1429. This hierarchical approach reflected the nuisance and externality foundations of zoning, for it was believed that nonreciprocal costs were imposed upon less intensive uses by their more intensive neighbors. Thus, zoning protected the less intensive uses and left the more intensive ones “no worse off than before zoning.” R. BABCOCK, *THE ZONING GAME* 127-28 (1966).

This is different from the concept of “selective” or “noncumulative” zoning, which requires that in each district only that use for which it is zoned be developed. The trend has been in favor of this type of zoning, for external costs have been found to be imposed upon all types of uses, not just upon those considered less intensive in the hierarchical model. R. ANDERSON, *supra* note 6, at § 8.15; Cunningham, *Land-Use Control—The State and Local Programs*, 50 IOWA L. REV. 367, 386-88 (1965).

17. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205, 205-07 (1975). The New Jersey Supreme Court has noted, “Th[e] policy of land use regulation for a fiscal end derives from New Jersey’s tax structure, which has imposed on local real estate most of the cost of municipal and county government and

straints, newcomers could build low-value homes from which the local government would receive insufficient tax revenues to defray the costs of supplying services to the new households. The nonexclusive nature of many public services would allow new recipients to become free riders upon those residents already financing the supply of the services.¹⁸

Zoning, according to this justification, is an appropriate municipal response to the free-rider problem.¹⁹ A municipality can zone carefully to help guarantee that home values yield property tax revenues sufficient to cover the cost of supplying services. In addition, effective zoning of this sort prevents the redistribution of income from old residents to new that would occur in an unconstrained public service market.²⁰

B. *Defects in the Model*

Some of the premises necessary for zoning to effect the reduction of externalities and elimination of free riders do not comport with the real world, and municipalities that justify zoning according to these goals may in fact be serving other, parochial financial policies.²¹

of the primary and secondary education of the municipality's children." *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 171, 336 A.2d 713, 723, *appeal dismissed*, 423 U.S. 808 (1975).

Some commentators have argued that replacement of the property tax by a per capita taxation scheme would serve the municipal fiscal needs more efficiently. W. OATES, *FISCAL FEDERALISM* 128-31 (1972); Mills, *supra* note 14, at 537-38. Tradition and state constitutional restrictions render the adoption of such an alternative financial scheme unlikely.

18. The free-rider problem attends any public good because of its nonexclusive nature; it is difficult to restrict persons from utilizing a public good (such as police protection, parks, or clean air) once it is provided, even if the recipients do not pay for it. W. NICHOLSON, *supra* note 7, at 571; Note, *Equalization of Municipal Services: The Economics of Serrano and Shaw*, 82 YALE L.J. 89, 93-95 (1972). Many municipal services are not pure public goods, for additional costs are incurred when they are utilized by increasing numbers of persons. In this case the difficulty arises in the attempt to attribute to newcomers the incremental cost of supplying services to them. Thus the free-rider problem is a subset of the problem of externalities. Because of the distinctions between free riders and other externalities, however, they are separately discussed in this Note.

19. See Mills, *supra* note 14, at 534 ("Land-use controls are necessary to exclude free riders only because of reliance on property taxes to finance local government"); Hamilton, *supra* note 1, at 14-15 (same).

20. See White, *Fiscal Zoning in Fragmented Metropolitan Areas*, in *FISCAL ZONING AND LAND USE CONTROLS* 31, 36-37 (E. Mills & W. Oates, eds. 1975) (properly functioning neutral zoning helps eliminate possibility of income redistribution from old residents to newcomers); Hamilton, *supra* note 17, at 206-07 (properly enacted fiscal zoning enables local property taxes to function as prices for municipally supplied public goods; no redistributive effect is felt). The presence of newcomers who behave as free riders forces old residents to pay the incremental costs incurred in supplying services to the newcomers. This has the effect of reducing the income of the old residents and raising that of the free riders, thus redistributing income between the groups.

21. For empirical studies questioning the value of zoning in dealing with the ex-

1. *The Free-Rider Problem*

The argument that zoning eliminates free riders from the consumption of municipally supplied public services derives from the hypothesis of Charles Tiebout.²² He argued that, given certain assumptions,²³ household locational decisions are determined solely by shopping for the bundle of public services that gives the household the greatest utility.²⁴ In a region of various jurisdictions offering different bundles of services at corresponding tax rates, a household chooses the jurisdiction that offers the bundle giving the household the greatest satisfaction attainable given its budget constraint.²⁵ Theoretically, therefore, municipalities are homogeneous according to residential property values.²⁶

This model relies upon several assumptions. First, households are expected to have perfect interjurisdictional mobility; that is, they can relocate, at no cost, in the municipality that offers the bundle of public services they desire and can afford.²⁷ This, of course, is not true.²⁸ Second, the model assumes that households' locational decisions are determined solely by their choices of municipal public services. In fact, however, exogenous considerations, such as proximity to employment centers, access to the central city and transportation networks, and

ternality problem, and whether the problem exists at all as perceived, see Davis, *supra* note 1, at 385 ("the democratic process may not always impose those constraints which simply result in the elimination of external diseconomies in the pricing system in urban property"); Maser, Riker, & Rosett, *supra* note 15, at 128 (zoning externalities trivial, supporting principal finding that "zoning is ineffective"); cf. Rueter, *Externalities in Urban Property Markets: An Empirical Test of the Zoning Ordinance of Pittsburgh*, 16 J. LAW & ECON. 313, 336-37 (1973) (although zoning can serve worthwhile purposes, "there is little likelihood that all of the external effects anticipated by the zoning ordinance actually arise in urban property markets").

22. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POLITICAL ECON. 416 (1956).

23. These assumptions are discussed below.

24. Tiebout, *supra* note 22, at 418, 422.

25. *Id.* at 418; Hamilton, *supra* note 17, at 206 ("Households have no locational preference *per se*; they locate so as to maximise [their utility].")

26. See Hamilton, *supra* note 17, at 206 ("every household in a given community consumes the same amount of housing"). Professor Hamilton's empirical results challenge this conclusion, however. See Hamilton, Mills, & Puryear, *The Tiebout Hypothesis and Residential Income Segregation*, in FISCAL ZONING AND LAND USE CONTROLS 101, 113-14 (E. Mills & W. Oates, eds. 1975). Homogeneity of property values in turn correlates with homogeneity by personal income level. See *id.* at 108-09; Mills & Oates, *The Theory of Local Public Services and Finance: Its Relevance to Urban Fiscal and Zoning Behavior*, in *id.*, at 1, 5.

27. Tiebout, *supra* note 22, at 419, 422.

28. Tiebout recognizes the importance of this assumption and that it is not duplicated in the real world. *Id.* at 421-22; cf. Hamilton, Mills, & Puryear, *supra* note 26, at 102-03 (interjurisdictional mobility limited, so presumption that equilibrium may be attained in public services market weaker than in most markets).

environmental and topographic factors, all play a significant role in such choices as well.²⁹

Most importantly, the model assumes that within a region there exists a sufficiently large number of jurisdictions offering different bundles of services at different tax rates.³⁰ Such diversity does not exist. The number of jurisdictions, and therefore the number of available bundles of services, in most regions is limited,³¹ and not all persons can find satisfactory affordable housing. This is especially true of low-income households: municipalities supplying services at a tax level that the poor can afford seldom exist. Even when they do, it could be argued that income should not be the sole determinant of the amount or quality of public services a household receives. Some services are considered so necessary or fundamental that they should be available regardless of the ability to pay.³²

The result of these conditions is that in contrast to the conclusions derived from the Tiebout theory, a large number of households in a given region will be unable to find satisfactory housing. This is because each municipality has an incentive to restrict the development of uses, such as low-income housing, that constitute free riders. Zoning municipalities thus avail themselves of the market failure to restrict the supply of developable land for such uses to a level too low to satisfy regional demand.

2. *Municipal Market Power*

The developable land of a given municipality is not fungible with land in other jurisdictions. Because of various characteristics of the land itself, the location of the municipality, or the services it offers, the demand for its land is not fully elastic.³³ Homeowning residents of

29. Hamilton, Mills, & Puryear, *supra* note 26, at 103.

30. Tiebout, *supra* note 22, at 419.

31. Hamilton, Mills, & Puryear, *supra* note 26, at 103; Mills, *supra* note 14, at 534.

32. Most prominent among these is the right to primary education. *See, e.g.,* Serrano v. Priest, 5 Cal. 3d 584, 589, 487 P.2d 1241, 1244, 96 Cal. Rptr. 601, 604 (1971) ("the right to an education in our public schools is a fundamental interest which cannot be conditioned on wealth"); Horton v. Meskill, 172 Conn. 615, 648-49, 376 A.2d 359, 374 (1977) (elementary and secondary education a fundamental right, equal enjoyment of which is guaranteed to every pupil). *But cf.* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 35-37 (1973) (education not a fundamental federal right).

A related argument could be made, protesting the municipal homogeneity that results from zoning according to the Tiebout model, because it sacrifices the social goals of integration and redistribution of wealth. The Tiebout model can accommodate such goals if they are conceived as components of the bundles of goods that constitute the utility functions of households making locational choices. The proposal in this Note explicitly includes these goals among the objectives to be satisfied by zoning. *See* p. 765 *infra*.

33. White, *supra* note 20, at 42.

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a municipality can use the zoning power to take advantage of its market position, much as a monopolist does in a private market.³⁴ These residents' primary economic considerations are the improvement of the value of their homes and the limitation of the taxes they must pay for municipal services.³⁵ The municipal government, representing the homeowners' electorate,³⁶ thus will use the zoning power to restrict the land available for development of new homes, since the reduction of supply, given constant demand, will result in an increase in the value of the existing housing stock.³⁷ Also, zoning to require construction of expensive large-lot homes guarantees that newcomers who move into the homes will pay substantial property taxes. If the tax revenues received are greater than the pro rata cost of supplying public services to the new households, then the zoning results in a redistribution of wealth from the new residents to the municipality.³⁸

Additionally, this type of zoning forces other municipalities in the region to bear the burden of supplying land for those uses restricted

34. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 430-35 (1977); Hamilton, *Zoning and the Exercise of Monopoly Power*, 5 J. URB. ECON. 116, 119-22 (1978).

35. These conclusions follow from the assumptions that producers or suppliers strive to maximize their profits and consumers strive to maximize utility. See note 7 *supra*. The discussion in Ellickson, *supra* note 34, at 400-01, on the distributional effects of municipal growth controls implies the existence of these motivations on the part of homeowners.

36. The argument that a suburban municipal government will represent its resident homeowners' electorate is based upon several assumptions. First, early in the development of a municipality, as it changes from a rural area, resident homeowners become a majority of its inhabitants. Then, assuming that the politics of a municipality obey a majoritarian model, the concerns and viewpoint of the homeowners' majority will thereafter dominate the considerations and behavior of the elected officials. Ellickson presents a majoritarian model of suburban politics in which local officials, striving to be reelected, work to maximize the satisfaction of the median voter. When homeowners constitute a majority of the voters in a municipality, a common occurrence in developing communities, their interests will be represented in government as those of the community as a whole. Ellickson, *supra* note 34, at 404-07.

37. For a graphical presentation of this argument, see D. ERVIN, J. FITCH, R. GODWIN, W. SHEPARD, & H. STOEVENER, *LAND USE CONTROL* 88-89 (1977) [hereinafter cited as *LAND USE CONTROL*].

Such restrictive zoning could work to the financial disadvantage of owners of the existing housing stock if the restrictions forestalled development of moderate-income housing whose collective tax payments would be greater than that of large-lot homes. This possibility would arise when a lot zoned for a single home could be subdivided for development of several residences whose total taxable value was greater than that of a single large-lot home. When this occurs, the owners of existing homes must weigh the benefits of restrictions against the costs of tax revenues foregone. When lower-income housing is the use whose development is restricted, the costs decline in significance, since the tax revenues obtainable from such housing are small. In fact, they may not suffice to defray the costs incurred in supplying municipal services to the residents, which raises the free rider issue, discussed at pp. 753-54 *supra*.

38. White, *supra* note 20, at 37-38, 43.

or banned from the zoning municipality.³⁹ In this manner the restrictive municipality itself becomes a free rider upon other communities in the region. It shares the benefit of other municipalities' supplying land and services for the uses it bans, in that the supply elsewhere reduces the pressures upon it to supply land for the unwanted uses, and in that its residents gain utility from the knowledge that regional needs for unwanted uses are somewhere satisfied.⁴⁰ The restrictive municipality, however, bears none of the costs incurred in the development of the unwanted uses.

II. The Development of Zoning Law

A major cause of the diseconomies of zoning is the limited scope of concerns upon which municipalities may focus when acting under the zoning power. Although the economic problems purportedly addressed by zoning and the effects of zoning actions are regional in scope, municipalities traditionally have been required to consider only the welfare of their own citizens when acting under the zoning power.⁴¹

A. Traditional Government Attitudes Toward Zoning

Although the power to zone is one of the state government's police powers,⁴² every state has delegated that power to its municipal subdivisions.⁴³ Most early state enabling acts specifically limited the

39. Ellickson, *supra* note 34, at 402-03.

40. This argument is based upon the assumption of the interdependence of consumers' utility functions, which results in increased satisfaction to some consumers when increased amounts of goods are distributed to others. *See* p. 765 *infra*.

41. For discussions of the limited value of the concept of municipal jurisdictions in determining the effects of zoning, see Bigham & Bostick, *Exclusionary Zoning Practices: An Examination of the Current Controversy*, 25 VAND. L. REV. 1111, 1141-42 (1972); Comment, *Regional Impact of Zoning: A Suggested Approach*, 114 U. PA. L. REV. 1251, 1251 (1966). The New Jersey Supreme Court has stated:

The effective development of a region should not and cannot be made to depend upon the adventitious location of municipal boundaries, often prescribed decades or even centuries ago, and based in many instances on considerations of geography, of commerce, or of politics that are no longer significant with respect to zoning.

Duffcon Concrete Prods. v. Borough of Cresskill, 1 N.J. 509, 513, 64 A.2d 347, 350 (1949).

42. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926); *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 174, 336 A.2d 713, 725, *appeal dismissed*, 423 U.S. 808 (1975); R. ANDERSON, *supra* note 6, at §§ 3.01-.03.

43. On the delegation of the right to zone under the police power, see R. ANDERSON, *supra* note 6, at § 3.09. Under the police power, local jurisdictions may regulate the activities of citizens for the purpose of protecting their health, safety, morals, and general welfare. *Id.* at § 2.06.

Some state constitutions grant municipalities home-rule powers that have been interpreted to include the right to zone, independent of the power delegated by the state legislature through enabling acts. *See, e.g.*, CALIF. CONST. art. XI, § 7; OHIO CONST. art.

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zoning power to actions “promoting health, safety, morals, or the general welfare of the community.”⁴⁴

1. *The Federal Judiciary and Zoning*

The federal courts became involved early in constitutional challenges to municipal use of the zoning power. In *Village of Euclid v. Ambler Realty Co.*,⁴⁵ the Supreme Court in 1926 upheld against a due process challenge⁴⁶ a municipality’s right to zone under the police power.⁴⁷ *Euclid* established a presumption of legality for the zoning power,⁴⁸ and for many years the Supreme Court all but refused to consider challenges to exercises of the zoning authority.⁴⁹ Recently the Court

XVIII, § 3. Such constitutionally granted zoning powers are limited, however, by the specific requirements in the enabling act. R. ANDERSON, *supra* note 6, at § 3.06.

The zoning power has been delegated to municipalities rather than retained and exercised by the state governments in the belief that land use regulation is primarily a local concern. *Id.* at § 3.01.

44. STANDARD ENABLING ACT, *supra* note 2, at § 1.

The “welfare” on behalf of which municipalities may zone has been defined by the courts over the years with a great degree of breadth. For example, in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), the Supreme Court stated that

[t]he police power [which is exercised, *inter alia*, to protect the “general welfare”] is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Id. at 9; *cf.* *Berman v. Parker*, 348 U.S. 26, 32-33 (1954) (aesthetic and “spiritual” considerations part of concept of “public welfare”); R. ANDERSON, *supra* note 6, at § 7.03 (court decisions “reveal an expanding judicial concept of the public welfare and a consequent enlargement of the police power in relation to zoning ordinances”).

45. 272 U.S. 365 (1926).

46. The due process argument in *Euclid* was that zoning that reduced the value of plaintiff’s property deprived him of his liberty and property without due process of law, as required by the Fourteenth Amendment. *Id.* at 384.

47. *Id.* at 395. Two years later, in *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), the Court found the challenged zoning ordinance to be unconstitutional, but only to the extent that it deprived plaintiff of the use of his property for no rational purpose. The constitutionality of the zoning power itself was not challenged, and *Euclid* was relied upon for its support. *Id.* at 187-88. *Nectow* initiated a narrow geographic interpretation of the community interests on behalf of which a municipality must zone, by limiting the scope of inquiry to only that part of the city in which the plaintiff’s land lay. *Id.* at 188; *see* Note, *Zoning: Looking Beyond Municipal Borders*, 1965 WASH. U.L.Q. 107, 118 (traditional focus in determining parties in whose behalf municipality must zone restricted to residents).

48. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (ordinance must be “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare” before declared unconstitutional); *cf.* *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting) (“[D]eference should be given to governmental judgments concerning proper land-use allocation. That deference is a principle which has served this Court well Our role is not and should not be to sit as a zoning board of appeals.”)

49. After *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), the Supreme Court did not continue to play the role of scrutinizing individual zoning ordinances that seemed to follow from its actions in that case. *See* Bigham & Bostick, *supra* note 41, at 1115.

has reentered the field to adjudicate several cases in which specific zoning ordinances were challenged because they allegedly violated fundamental rights guaranteed by the Constitution.⁵⁰ Neither the legality of the exercise of the zoning power itself nor the economic effects of the ordinances were challenged, yet the Court continued to use the presumption of legality established in *Euclid*.⁵¹

The presumption of legality has developed with an attitude of reluctance to intervene on the part of the federal judiciary. Federal courts have supplied two reasons for their reluctance to become in-

Between the time of the *Nectow* decision and the early 1970s, the Court decided only one minor zoning case. *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928) (ordinance requiring consent of owners of property surrounding building before building may be replaced by larger structure held violative of due process).

50. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (ordinance restricting type of family members who could cohabit apartment found to violate due process guarantee of liberty); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (refusal to rezone for low-income housing project alleged to violate equal protection guarantee). The lower federal courts have adjudicated numerous similar cases. See, e.g., *Construction Indus. Ass'n of Sonoma County v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

51. The presumption of legality established in *Euclid* for cases challenging the economic effects of zoning is of questionable applicability in cases involving alleged infringements of fundamental rights, which typically require stricter scrutiny of the governmental activity. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (state impairment of right to vote subject to strict judicial scrutiny); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943) ("freedoms of speech and of press, of assembly, and of worship . . . are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect"). Nonetheless, in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), in which the complaint alleged that the local regulation violated plaintiffs' rights of privacy and association, the Court upheld the ordinance after a brief affirmation of an expansive concept of "general welfare" in behalf of which a municipality may regulate behavior. See *Williams & Doughty, Studies in Legal Realism: Mount Laurel, Belle Terre, and Berman*, 29 RUTGERS L. REV. 73, 78-79 (1975) (Court in *Belle Terre* "brushed aside" plaintiffs' arguments that zoning ordinances infringed upon their fundamental rights). *Belle Terre's* expansive notion of "general welfare" is directly descended from that found in *Berman v. Parker*, 348 U.S. 26, 33 (1954) ("The concept of the public welfare is broad and inclusive.")

In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), in which an ordinance restricting the type of family members who could cohabit an apartment was narrowly struck down, the plurality opinion argued that *Euclid* was not dispositive because the instant case involved a violation of fundamental rights. *Id.* at 499 (Powell, J., announcing judgment of the Court). Two dissenters, however, urged analysis in the presumptive style of *Belle Terre*. *Id.* at 534-35 (Stewart, J., dissenting). See *Developments—Zoning, supra* note 4, at 1569-74 (discussing *Moore* and *Belle Terre*).

The Supreme Court recently granted certiorari to review a California Supreme Court decision that presented the issue whether zoning regulations alone could constitute a taking of private property requiring just compensation under the Fifth Amendment. *Aguins v. City of Tiburon*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *cert. granted*, 48 U.S.L.W. 3426 (U.S. Jan. 7, 1980) (No. 79-602). Both the final decision of the Supreme Court and the reasoning it employs could influence significantly the zoning activities of restrictive municipalities.

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volved in zoning issues: first, that zoning is a local problem properly challenged in state courts or through the local "democratic process"; and second, that federal courts are less equipped than local forums to solve zoning problems because of the minute complexities involved.⁵² This attitude has hindered nonresidents' efforts to employ federal courts to challenge municipal zoning practices that have regional ramifications.⁵³ Moreover, even in those cases in which relief has been granted, the remedies authorized have been narrow in scope. Successful cases have tended to involve requests for rezoning to permit the development of a specific project, and the relief has been limited to effecting this request.⁵⁴ Broader relief involving the whole of a municipality's zoning scheme is avoided when the complaint alleges only a particular wrong; yet challenges have less chance of success if they are framed in broad terms requesting municipality-wide relief.⁵⁵ Thus

52. See *Warth v. Seldin*, 422 U.S. 490 (1975). In *Warth* the Court discussed both these factors in determining whether the plaintiffs had standing to sue in federal court. The Court stated that standing limitations are necessary so that it is not called upon to decide questions better resolved by other governmental institutions. *Id.* at 500. Later the Court noted that "zoning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local legislative authorities. . . . [C]itizens dissatisfied with provisions of such laws need not overlook the availability of the normal democratic process." *Id.* at 508 n.18.

Commentators have argued that these questions of competence and forum allocation influenced the Court's application of standing doctrine in *Warth*. See, e.g., Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373, 1389-92 (1978) (refusal to grant standing as means of forum allocation and of avoiding adjudication); Lamb & Lustig, *The Burger Court, Exclusionary Zoning, and the Activist-Restraint Debate*, 40 U. PITT. L. REV. 169, 220 (1979) (standing doctrine "perverted" in pursuit of power allocation policy).

53. Standing to sue has been restricted to permit litigation on the part of only those parties who can prove palpable injury from the municipal actions and to whom the court believes a substantial probability of assistance will result from any relief awarded. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 260-64 (1977); *Warth v. Seldin*, 422 U.S. 490, 498-501, 504 (1975). But cf. Sager, *supra* note 52, at 1384 (proposition that plaintiff will actually secure improved housing if suit tied to specific housing project rests upon faulty empirical premise); *id.* at 1386-88 (discussion of same issue in context of *Arlington Heights*).

54. Narrow remedies are in part a result of the narrow focus of the issues that develops from the restrictive standing requirements applied by the courts. See Lamb & Lustig, *supra* note 52, at 215 ("[i]n narrowing the issue to a specific project, the Court precluded even the most superficial attack on the loathsome effects of exclusionary zoning") (footnote omitted). Examples illustrate the restricted nature of the relief granted. In *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978), the remedy granted was an injunction requiring the rezoning of the specific plat for construction of the proposed project, but only if investigation were to reveal that no other area within the municipality suitable for construction of that project was already properly zoned for it. The remedy in *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971), another successfully prosecuted challenge, was an order enjoining the city from further interference with construction of the planned housing.

55. Because of the doubt whether the requested remedy will materially benefit plaintiffs, the standing hurdles are more difficult to overcome in such cases. Compare *Warth*

the major problems arising from improper zoning are rarely addressed, and the attempted corrections are of limited effect.

2. *The Traditional State Judicial Attitude*

The failure of the federal courts to undertake a systematic investigation of municipal zoning leaves resolution of these problems to the state governments. This in turn raises the issue of which branch of state government is most appropriate for such oversight. State courts generally have not been innovative in dealing with zoning issues. The perspective of these courts is usually limited such that only persons demonstrating violation of property interests are granted standing, and the effects of zoning upon nonresident parties with no direct property interests are not considered.⁵⁶ In addition, when analyzing state constitutional arguments, state courts have interpreted the delegation of zoning power to the municipalities in the same manner as has the federal judiciary.⁵⁷

Also, because the zoning power is created and its limits established by the legislature, and because the judiciary is felt to be less equipped than the legislature to deal with zoning problems,⁵⁸ the view has been advanced by commentators and courts that the legislature is the proper branch of government to regulate the use of the zoning power.⁵⁹ State court deference to the actions, or inaction, of the legislatures based upon this reasoning is widespread.⁶⁰

v. Seldin, 422 U.S. 490 (1975) (standing denied to nonresidents and to builders' association in case requesting municipality-wide relief) with *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (standing granted for builder and nonresident to challenge zoning ordinance affecting specific housing project).

56. Comment, *Standing to Challenge Exclusionary Local Zoning Decisions: Restricted Access to State Courts and the Alternative Federal Forum*, 22 SYRACUSE L. REV. 598, 598-99, 601-02 (1971).

57. See Comment, *A Survey of the Judicial Responses to Exclusionary Zoning*, 22 SYRACUSE L. REV. 537, 538-62 (1971).

58. See pp. 762-63 *infra*.

59. See Sager, *supra* note 52, at 1411-12. The role of the judiciary vis-a-vis the legislature in zoning was described by the New York Court of Appeals as follows:

Zoning . . . is essentially a legislative act. . . . To that end, we look to the Legislature . . . to foster the development of programs designed to achieve sound regional planning. . . . Until the day comes when regional, rather than local, governmental units can make such determinations, the courts must assess the reasonableness of what the locality has done.

Berenson v. Town of New Castle, 38 N.Y.2d 102, 111, 341 N.E.2d 236, 243, 378 N.Y.S.2d 672, 682 (1975); cf. *Bowe, Regional Planning Versus Decentralized Land-Use Controls—Zoning for the Megalopolis*, 18 DEPAUL L. REV. 144, 163 (1968) (questioning ability of judiciary to apply recommendations); Note, *The Inadequacy of Judicial Remedies in Cases of Exclusionary Zoning*, 74 MICH. L. REV. 760, 763-66 (1976) (traditional judicial approach one of deference to legislatures and local zoning bodies).

60. See Note, *General Welfare and "No-Growth" Zoning Plans: Consideration of Regional Needs by Local Authorities*, 26 CASE W. RES. L. REV. 215, 226-27 (1975).

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B. *Recent State Innovations and Their Limitations*

Significantly, some state governments recently have demonstrated an increased awareness of the regional impact of municipal zoning activities. In a few states, such as Pennsylvania, New Jersey, and to a lesser extent New York, the judicial attitude has shifted to a position less deferential to municipal zoning actions.⁶¹ Cases challenging zoning schemes have resulted in more thorough scrutiny of local activities in the courts of these states, limiting the effectively unrestricted zoning authority of municipalities.⁶² These decisions have held that zoning ordinances that severely restrict or ban the presence of certain uses or lot sizes within a municipality—and thus restrict the entry of low-income persons—for other than reasons of externalities or topography⁶³ violate the state constitutions or zoning enabling legislation.

61. Courts in other states have also, though somewhat erratically, spoken in this vein. *See, e.g.,* *Hamelin v. Zoning Bd. of Wallingford*, 19 Conn. Supp. 445, 117 A.2d 86 (C.P. 1955) (zoning changes not arbitrary; aggrieved nonresidents, however, entitled to judicial review of zoning decision); *Simon v. Town of Needham*, 311 Mass. 560, 42 N.E.2d 516 (1942) (one-acre minimum for single-home lots not unreasonable; local interests must yield, however, if conflict with general interests of public at large); *Huttig v. City of Richmond Heights*, 372 S.W.2d 833 (Mo. 1963) (zoning ordinance as applied so unreasonable as to violate due process; municipality must consider regional standpoint); *Board of County Supervisors of Fairfax County v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959) (restrictive zoning amendment unconstitutional because unreasonable and unrelated to welfare of area residents).

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), has been seen as a source for this line of argument, for the Court noted in dictum that given a case in which the public interest clearly outweighed that of the municipality, the latter would not be permitted to obstruct the former. *Id.* at 390.

62. *See, e.g.,* *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713, *appeal dismissed*, 423 U.S. 808 (1975) (developing municipalities must consider effects of zoning activities upon regional general welfare); *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975) (municipality and reviewing court must consider regional needs as well as municipality's own needs for housing); *Concord Township Appeal (Kit-Mar Builders)*, 439 Pa. 466, 268 A.2d 765 (1970) (zoning township cannot disregard interests of entire area and must accommodate needs of growing regional population).

For discussions of the innovations of these state courts, see Comment, *supra* note 57, at 564-74; Comment, *Exclusionary Zoning and a Reluctant Supreme Court*, 13 WAKE FOREST L. REV. 107, 131-36 (1977).

63. *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 186-87, 336 A.2d 713, 731, *appeal dismissed*, 423 U.S. 808 (1975); *cf. National Land & Inv. Co. v. Easttown Township Bd. of Adjustment*, 419 Pa. 504, 525-31, 215 A.2d 597, 608-12 (1965) (environmental arguments against zoning for increased housing development). Although it is argued that neutral fiscal objectives may also permissibly support zoning restrictions, some courts have been unwilling to approve such exclusionary manifestations. *Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville*, 67 A.D.2d 70, 82-83, 414 N.Y.S.2d 573, 581 (1979); *National Land & Inv. Co. v. Easttown Township Bd. of Adjustment*, 419 Pa. 504, 532, 215 A.2d 597, 612 (1965). In *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713, *appeal dismissed*, 423 U.S. 808 (1975), the New Jersey Supreme Court held that taxation and service considerations are permissibly dealt with through zoning, provided that it is "done reasonably." 67 N.J. at 185, 336 A.2d at 731 (*quoting* *Gruber v. Mayor of Raritan*, 39 N.J. 1, 186 A.2d 489 (1962)).

The Supreme Court of New Jersey took an additional step in *Southern Burlington County NAACP v. Township of Mt. Laurel*,⁶⁴ holding that the state constitution⁶⁵ and enabling legislation mandate that municipalities consider the regional housing needs and regional ramifications of zoning activities when they enact or amend ordinances.⁶⁶ Local zoning authorities, therefore, have an affirmative duty to broaden the range of housing and land uses that may be developed within their jurisdiction.⁶⁷ The *Mt. Laurel* decision developed the concept of "fair share" zoning, invoked by the New Jersey courts in subsequent cases,⁶⁸ which requires developing municipalities to allocate land for their estimated pro rata share of the uses—specifically low-income housing—for which demand for new development far outstrips land supply under current zoning schemes.⁶⁹

Few state courts have followed the innovative lead of Pennsylvania and New Jersey in scrutinizing exclusionary practices.⁷⁰ The reluctance of most courts to confront the zoning issue is based at least in part upon a realistic recognition of the substantial problems attending judicial

64. 67 N.J. 151, 336 A.2d 713, *appeal dismissed*, 423 U.S. 808 (1975).

65. The decision was based upon the New Jersey equal protection and due process clauses. 67 N.J. at 174-75, 336 A.2d at 725. One concurring judge argued that because the case could have been resolved solely on the basis of the enabling legislation, reliance upon the state constitutional provisions was unnecessary. 67 N.J. at 193, 336 A.2d at 735 (Moun-tain, J., concurring).

66. The court stated:

[I]t is fundamental and not to be forgotten that the zoning power is a police power of the state and the local authority is acting only as a delegate of that power and is restricted in the same manner as is the state. So, when regulation does have a substantial external impact, the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served.

67 N.J. at 177, 336 A.2d at 726; *cf.* *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 495, 371 A.2d 1192, 1198 (1977) (zoning municipalities must serve "general welfare represented by satisfaction of the housing needs of lower income people throughout the region").

67. 67 N.J. at 174, 336 A.2d at 724-25; *cf.* *Surrick v. Zoning Hearing Bd.*, 476 Pa. 182, 189, 382 A.2d 105, 108 (1977) (local land use regulations must "meet the legitimate needs of all categories of people who may desire to live within its boundaries").

68. *See, e.g.,* *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 553-54, 371 A.2d 1192, 1228 (1977); *Urban League of Greater New Brunswick v. Mayor of Carteret*, 142 N.J. Super. 11, 359 A.2d 526 (Super. Ct. Ch. Div. 1976), *pet. for certification denied*, 74 N.J. 262 (1977).

69. The New Jersey Supreme Court stated only that each municipality must "bear its fair share of the regional burden." 67 N.J. at 189, 336 A.2d at 733. This was applied as a pro rata formulation in *Urban League of Greater New Brunswick v. Mayor of Carteret*, 142 N.J. Super. 11, 359 A.2d 526 (Super. Ct. Ch. Div. 1976), *pet. for certification denied*, 74 N.J. 262 (1977), in which the court required each municipality initially to zone for low- and moderate-income housing so that the proportion of each town's population represented by these income groups would equal that of the region as a whole. 142 N.J. Super. at 36-37, 359 A.2d at 541. For a discussion of the method of pro rata allocation adopted in this Note, see note 79 *infra*.

70. Sager, *supra* note 52, at 1400-01 & n.95; Comment, *supra* note 56, at 610.

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intervention in this area. The complex issues involved are not easily confronted through the adjudicatory process,⁷¹ and post-litigation results have been of questionable success.⁷² In addition, uniform state-wide policy is not best developed by the judiciary, which can deal with a given issue only in isolated cases.

These objections do not apply to the state legislatures, which are capable of dealing with complex issues such as zoning in a more comprehensive, uniform, and detailed manner.⁷³ For example, some state legislatures have enacted or amended their original enabling legislation delegating the zoning power to require regional planning or to require allocation within each municipality of a small amount of land for specific uses.⁷⁴ These legislative attempts, however, are not fully responsive to the economic harms that flow from the improper exercise of the zoning power. To this end, the following recommendation for legislative action is presented.⁷⁵

71. Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PA. L. REV. 515, 530-31 (1957); Note, *supra* note 59, at 766-86. Even the activist Supreme Court of New Jersey observed,

[T]he governmental-sociological-economic enterprise of seeing to the provision and allocation throughout appropriate regions of adequate and suitable housing for all categories of the population is much more appropriately a legislative and administrative function rather than a judicial function to be exercised in the disposition of isolated cases.

Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 534, 371 A.2d 1192, 1218 (1977) (footnote omitted). The court noted, however, that until the other branches of government act effectively, the judiciary must deal with challenges to exclusionary zoning as best it can. 72 N.J. at 535-36, 371 A.2d at 1219; *cf. id.* at 620-21, 371 A.2d at 1262 (Schreiber, J., concurring) (judicial remedy cannot eliminate system of taxation and municipal finance that causes exclusion; only legislature can enact such relief).

72. Professor Sager has noted that even "successful" litigation can have only minimal results in bringing about the development of new housing. Sager, *supra* note 52, at 1384-85 nn. 40 & 41.

73. See Mytelka & Mytelka, *Exclusionary Zoning: A Consideration of Remedies*, 7 SETON HALL L. REV. 1, 5-6 (1975); Comment, *State Police Power—Zoning—Validity of Local Ordinance Depends on Considerations of Regional, Not Merely Local, General Welfare*, 25 VAND. L. REV. 466, 473 (1972).

74. See, e.g., MASS. ANN. LAWS ch. 40B, §§ 20-23 (1973 & Supp. 1978) (Michie/Law. Co-op) (procedure facilitating development of low- and moderate-income housing); UTAH CODE ANN. § 17-27-13 (1953) (purpose of zoning regulations to benefit inhabitants of entire state). For a descriptive list of such legislation in New Jersey, see Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 189 n.22, 336 A.2d 713, 732 n.22, *appeal dismissed*, 423 U.S. 808 (1975).

75. A difficulty arising from reliance upon state legislative action confronts those regions (such as metropolitan New York City and Washington, D.C.) that include municipalities in more than one state. These situations require cooperation among the states in enacting proper legislation and determining the allocation of developable land in the several communities. Such interstate cooperation in planning has occurred in a few situations, such as the case of the Tri-State Regional Planning Commission. These agreements might constitute interstate compacts, however, which require congressional consent to be valid. U.S. CONST. art. I, § 10; see *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978).

III. A Legislative Proposal

To ensure economic efficiency in housing and land use development, zoning legislation must serve two goals: first, it must guarantee that within a region a sufficient amount of land is allocated for development of uses for which demand exists; and second, these uses must be distributed rationally among communities. To satisfy these requirements, state legislatures should amend the zoning enabling acts to set more comprehensive guidelines for municipal zoning actions. First, the general statement of policy must redefine the general welfare on behalf of which zoning municipalities are required to act. The welfare must be cast in terms of the whole region in which the municipality is located.⁷⁶ This would clarify that state policy requires municipalities to make available the necessary amount of land for all uses within the region, thus satisfying the first of the two zoning objectives.

With nothing more, however, this legislative action would allow municipalities freely to determine what uses to restrict or ban because they are thought to impose external costs upon present residents, provided that municipalities could demonstrate that land for the restricted uses could be allocated at less social cost in other communities in the region. This is unsatisfactory, for comparative measurement of the negative external effects of a given use upon different areas within a region is difficult, and no mechanism exists to reveal the actual costs imposed by requiring municipalities to supply land for unwanted uses. Thus, municipalities can present their preferences disingenuously, overvaluing development of present uses and overestimating the costs imposed by other uses. Reliance upon such presentations to satisfy the

76. In the states with zoning laws in statutory form, the new requirement could be appended to the present law by an amendment. In those states that provide for the delegation of the zoning power in the constitutions, the alteration would take one of two forms. If there is no provision explicitly to the contrary, the alteration could be enacted as part of the implementing statute specifying the zoning powers and activities of the municipalities; no amendment of the state constitution would be necessary. If there exists a constitutional provision that would be violated by a statutory attempt to require regional considerations in zoning, then the change would have to be enacted through the more cumbersome route of a constitutional amendment.

Other commentators have made similar recommendations. Some acknowledge that zoning affects the areas beyond municipal boundaries and argue that this militates for legislation requiring regional considerations in zoning. *Bowe, supra* note 59; *Note, supra* note 60. Others argue for judicial action to the same effect. *Comment, supra* note 41; *Note, A Regional Perspective of the "General Welfare,"* 14 *SAN DIEGO L. REV.* 1227 (1977). Still others base their conclusions on an entirely different line of reasoning, *i.e.*, that because the municipalities zone under a delegation of state legislative power, they must consider statewide needs and impact of their actions. *Walsh, Are Local Zoning Bodies Required by the Constitution to Consider Regional Needs?* 3 *CONN. L. REV.* 244 (1971).

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efficiency requirement would allow municipalities to supply less land than is necessary to satisfy regional demand, and disingenuous restrictive communities could avoid the burden of developing such uses altogether.

The concept of efficiency also includes distributional aspects that can counteract this potential result. The desire for racial integration and for redistribution of income can be conceived as a good that gives utility to consumers and thus is includable, like any other good, in every individual's utility function.⁷⁷ Each person gains satisfaction to some extent, varying substantially among individuals, from efforts to equalize differences in wealth, income, opportunities, or other factors, and from the knowledge that these efforts are undertaken by society. This aspect of utility is evidenced, for example, by recent movements to integrate the housing market, to establish affirmative action programs in higher education and employment, and to amend the method of public school financing to guarantee greater equality of funding among school systems.⁷⁸

Including this variable in consumers' utility functions requires expansion of the efficiency criterion to include distributional considerations. Exact empirical determination of the optimal mix of uses to satisfy the distributional aspect of the efficiency criterion would be difficult, and therefore no rigid rule should be established. The following two-step approach to the problem of allocating land presents a compromise solution that balances the concerns of distribution with other efficiency considerations.

A. "Fair Share" Allocation

As a first step, the regional demand for those uses for which insufficient land is allocated should be estimated and the necessary land

77. For a discussion of distribution as a criterion for efficiency, see Hochman & Rodgers, *Pareto Optimal Redistribution*, 59 AM. ECON. REV. 542 (1969). They note:

Given interdependence among individual utility functions, it is possible that some redistribution will make everyone better off. Efficiency criteria can be applied, therefore, to redistribution of income through the fiscal process. . . . Both allocation and redistribution can be dealt with in terms of the same methodology and the same criterion—efficiency. Then it can be argued that the distributive goal of vertical equity is contained within the Paretian concept of efficiency.

Id. at 543 (footnotes omitted).

78. See, e.g., *United Steelworkers of America v. Weber*, 99 S. Ct. 2721 (1979) (affirmative action on-the-job training program held not violative of equal protection); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (challenge of medical school's affirmative action program); *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (1977) (public school financing through local property taxes with no regard for differential among municipalities' fiscal status unconstitutional); *Fair Housing Act*, 42 U.S.C.A. § 3601 (West 1976 & Supp. 1979) (forbidding racial discrimination in sale or rental of dwellings).

apportioned pro rata among all the municipalities in the region.⁷⁹ This will ensure that sufficient land for each use is made available and that the burden of supplying the land is widely distributed.⁸⁰ The initial estimate would include projections of future regional development and of the demand for various uses for a given number of years. Developed communities as well as developing suburbs would be included in the allocation process⁸¹ and would be required to rezone

79. For example, if the projected development of the region were to require that X% of its land be made available for a given use, then each community would allocate X% of its total land for development of that use. The pro rata allocation of uses is based upon the amount of land within the borders of each municipality. Land, rather than some other factor such as population, is used as the criterion because use of the former has a greater redistributive effect. Were the allocation related to population or population density, for example, then substantial development of the unwanted uses would be required in the most highly populated areas, while undeveloped communities or those that already successfully zoned to restrict growth would face minimal allocations of the unwanted uses. One commentary, in interpreting *Mt. Laurel*, bases the pro rata allocation upon the income distribution of the inhabitants of the region. Thus if X% of the regional population has income level Y, then each municipality must zone so that X% of its inhabitants will have income level Y. Inman & Rubinfeld, *The Judicial Pursuit of Local Fiscal Equity*, 92 HARV. L. REV. 1662, 1718-19 (1979). This is very similar in application to the proposal in this Note.

80. The required "fair share" allocation would be applicable only to those uses, most prominently low-income housing, that municipalities do not desire to develop within their jurisdictions. The public goods aspect of the housing market, allowing municipalities to supply too little land for development of the use to satisfy demand, is most acute for these uses. For the uses that municipalities find desirable, such as large-lot housing, municipalities will not restrict development and the market will allocate sufficient amounts of land to meet demand. Thus no required "fair share" allocation of land for these uses is necessary. The preexisting allocation for such uses might, in fact, be reduced to permit increased zoning for the uses required under the "fair share" plan.

Scattered distribution of some uses, such as heavy industry, that impose obvious physical externalities or that gain obvious benefits when located in specific topographic situations, would be inefficient. An argument might be made that such uses should be excepted from the regional "fair share" allocation plan, rather than force municipalities to rely upon the market mechanism, presented at pp. 767-68 *infra*, with its attendant transaction costs, to reduce the resulting inefficiencies. Two considerations, however, militate for inclusion of these uses in the proposed scheme. First, no brightline exists to distinguish these uses from those that impose external costs only according to the idiosyncratic calculations of certain restrictive municipalities. Second, inclusion of uses obviously imposing externalities would encourage municipalities to accept the proposed trading mechanism and to use it in other situations as well, which might not occur if it were to be utilized only in difficult cases. In the longrun this would facilitate trading to attain an efficient regional distribution of uses.

81. In this way the proposal differs from the actions of the New Jersey courts, which placed the burden of supplying land to meet regional demand upon developing communities. See, e.g., *Pascack Ass'n v. Mayor of Washington*, 74 N.J. 470, 379 A.2d 6 (1977) (*Mt. Laurel* does not apply to small town, only 2.3% of whose land still undeveloped); cf. *Developments—Zoning*, *supra* note 4, at 1654-56 (discussing desirability of requiring developed communities to provide land for special uses). The proposal is less harsh upon developing communities than are the decisions of the New Jersey courts, but it presents more of a challenge to the status quo in developed communities. Thus the proposal presents a more balanced technique for spreading the burden of supplying land for unwanted uses throughout a given region. For a discussion of the impropriety of requiring

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those areas still vacant or being redeveloped if their present zoning scheme fell short of their pro rata share.⁸²

The initial allocation, however, would not complete the process. In later years, should the initial estimation be found to be inaccurate or should demand for a given use outrun supply, a new allocation would be required, apportioning among all municipalities the amount of land necessary to absorb the additional demand. In the years of growing demand the region itself will have expanded so that a greater number of municipalities can take part in the allocation of regional land resources.

B. *Transfer of Zoning Allocations*

This "fair share" allocation, however, should not be the final step, for it would not account for the legitimate zoning objective of limiting externalities. After the initial "fair share" allocation, municipalities should be permitted to trade or sell development rights to others in the region, so that those uses causing negative externalities in one area could be transferred to areas in which their development would be more efficient.⁸³ This transfer would result in the segregation of uses only to the extent that it limited negative externalities and reflected municipal preferences. Rather than permit each jurisdiction simply to state that a given use imposed greater costs upon it than upon other municipalities, the trade mechanism would allow it to ban that use from its borders only if it could find other municipalities in which development of the use was considered less costly.⁸⁴ Thus a

only developing communities to satisfy the low-income housing needs of the entire region, written in anticipation of the *Pascack* decision, see Buchsbaum, *The Irrelevance of the "Developing Municipality" Concept—A Reply to Professors Rose and Levin*, 5 REAL ESTATE L.J. 280 (1977).

82. If fully developed or not willing to disrupt the community character, a municipality can reduce the redistributive effects of this proposal by using the trading mechanism proposed below.

83. This is similar to the concept of private transferable development rights, instituted in some localities, such as midtown Manhattan. See LAND USE CONTROL, *supra* note 37, at 129-59.

The New Jersey Supreme Court in *Mt. Laurel* acknowledged that circumstances might require relaxation of the strict fair share rule. Relevant considerations include topographic or environmental concerns, 67 N.J. at 186-87, 336 A.2d at 731, although the problems must be "substantial and very real." *Id.* at 187, 336 A.2d at 731. The proposal developed in this Note requires no such proof of substantiality of effect, so long as municipalities wishing to avoid development of given uses find other communities in the region willing to accept them.

84. Substantial transaction and information costs will be involved when the various municipalities in a region attempt to trade or purchase development allocations among themselves. To facilitate the functioning of this market, the state legislature should appoint a "broker" for each region to gather and disseminate information and to catalyze prospective deals between municipalities.

municipality could refuse to develop a use only by transferring it to another municipality in exchange for another use it found less burdensome, or by paying to the transferee municipality a lump sum as a "purchase" of the right not to develop the unwanted use and to reimburse the transferee for accepting the use that imposed external costs upon it.⁸⁵

The process would encourage efficient allocation of resources by permitting municipalities to restrict the development of uses within their borders that imposed negative externalities upon their residents. The municipalities could not simply claim that unwanted uses caused externalities, however, and thereby totally avoid the burden of assisting the development of such uses within the region. The transfer step of the proposal would require municipalities to locate other communities in which the unwanted uses are acceptable at lower cost and to assist in the development of those uses in other communities. Thus the proposal would help solve the problems of insufficient supply of land for undesirable uses and of restrictive communities functioning as free riders upon less restrictive municipalities in the region.⁸⁶

85. This formulation does permit inclusion of objectionable considerations, such as race and income level, in the definition of externalities because of the difficulty of distinguishing the external effect of these considerations from the effects of other externalities. The proposal, however, counteracts this by requiring municipalities either to allocate land for these uses according to the fair share plan despite the external effects, or to transfer the duty to develop such uses to other communities with a lump sum payment or acceptance of development of other uses traded from the transferee community. This is a significant improvement over present law, which permits a municipality to restrict the development of a use within its borders, claiming that it imposes costs upon present residents, without considering the regional need for its development or assisting its development elsewhere.

86. These problems are discussed at p. 754 & p. 756 *supra*.

The feasibility of passage of this zoning proposal is an important issue. The recommendation reduces the freedom of municipalities to zone on their own behalf and might therefore be received with hostility in legislatures dominated by suburban representatives. Several factors, however, mitigate this unfavorable view. First, the legislatures of some states with large suburban populations, such as Massachusetts and New Jersey, already have passed laws restricting municipal zoning power, demonstrating that voting strength alone is not an insurmountable obstacle. Second, in states with other groups strongly represented in the legislature that have interests in amending the zoning law, coalitions can be formed to overcome the voting strength of recalcitrant suburban representatives.

In addition, the proposal need not be regarded with hostility by all suburban groups. The fair share allocation should satisfy those municipalities that have been slow to zone restrictively and that thus are bearing the burden of the restrictive policies of neighboring communities. The allocation of the duty to zone for specific uses among all the municipalities in the region would alleviate the fears of developing communities that they would be required to shoulder the burden of supplying all the land necessary for development of uses not wanted elsewhere. Also, since regional allocation would not greatly disrupt any individual community, opposition might be lessened. Finally, of course, the strict redistributive effects of this rule are ameliorated by the trading step that permits municipalities to limit the costs incurred from negative externalities.